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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DAVID GRANT, Plaintiff and Appellant, v. ASSISTMED, INC., Defendant and Respondent.	B289996 (Los Angeles County Super. Ct. No. BC503141)

APPEAL from an order of the Superior Court of Los Angeles County, David Sotelo, Judge. Affirmed.

Shulman Hodges & Bastian, Ronald S. Hodges, Gary A. Pemberton, and Shane M. Biornstad for Plaintiff and Appellant.

Apex Law and Thomas N. FitzGibbon for Defendant and Respondent.

In a related appeal from this matter, we affirmed the trial court's judgment in favor of defendant AssistMed, Inc. (AssistMed) on breach of contract claims brought by the company's former employee, David Grant, alleging AssistMed denied Grant a loan and other compensation under the parties' employment agreement. Grant now appeals the court's post-judgment order awarding AssistMed attorney fees the company incurred defending against Grant's claims. The court based its fee award on a provision in the employment agreement entitling the prevailing party to recover attorney fees in a lawsuit regarding the enforcement or interpretation of the agreement.

On appeal, Grant argues that AssistMed lacks standing to collect the fee award ordered by the trial court, because the company executed an assignment for the benefit of creditors several months before trial. We disagree. The record is insufficient to establish whether that assignment encompassed AssistMed's right to collect attorney fees in this matter—a right that, at the time of the assignment, was uncertain and contingent. We therefore cannot conclude that the assignment deprived AssistMed of standing.

Grant argues in the alternative that the court should have awarded only those fees AssistMed's counsel incurred while (1) defending against Grant's contract-based causes of action, rather than the related tort and labor code claims ultimately dismissed before trial; and (2) defending AssistMed, rather than the company's former CEO Leonardo Berezovsky, whom AssistMed's counsel also represented in this action until Berezovsky's death. Again, we disagree. Grant's causes of action all stem from a common factual core, all the claims Grant alleged against Berezovsky Grant also alleged against AssistMed, and the two

defendants filed joint demurrers to all complaints. We therefore conclude the trial court did not abuse its discretion in declining to apportion the fee award as between causes of action or defendants.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Grant's Claims Against AssistMed and Berezovsky*

On March 19, 2013, Grant filed his initial Complaint against AssistMed and Berezovsky, alleging five causes of action related to Grant's employment agreement with AssistMed: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) constructive discharge, (4) negligent misrepresentation, and (5) fraud. Through their shared counsel, AssistMed and Berezovsky demurred to Grant's initial complaint, and the court sustained the demurrer. Grant then filed a first amended complaint, which alleged a similar set of claims: (1) breach of written contract, (2) negligent misrepresentation, (3) fraud, (4) fraud in the inducement, and (5) failure to pay wages owed under the Labor Code. The court sustained the defendants' jointly-filed demurrer to this complaint as well. Finally, Grant filed a second amended complaint alleging two causes of action: breach of contract and fraud in the inducement. The trial court partially sustained the defendants' joint demurrer thereto, and the parties proceeded to a bench trial on the remaining breach of contract claim. Berezovsky died in March 2015, and was dismissed as a party shortly before trial.

At trial, the court granted AssistMed's motion for judgment pursuant to Code of Civil Procedure section 631.8 and issued a final judgment in favor of AssistMed, the sole remaining defendant, on April 4, 2017, which we subsequently affirmed in a nonpublished opinion. (*Grant v. AssistMed, Inc.* (Nov. 5, 2018, No. B283303)

[nonpub. opn.].) Our opinion in that appeal discusses the facts underlying Grant's claims in detail. (See *Grant v. AssistMed, Inc.*, *supra*, B283303.) We do not repeat them here.

B. *AssistMed's Assignment for the Benefit of Creditors*

On March 21, 2017—a month after AssistMed had prevailed at trial—Grant requested the trial court take judicial notice of the fact that several months earlier, AssistMed had ceased business operations and made "an Assignment for the Benefit of Creditors to BOT Financial [LLC (BOT)]." In support of this request, Grant offered an October 14, 2016 letter from BOT to "AssistMed, Inc.'s Creditors, Equity Holders, and other Parties in Interest," advising that "on October 4, 2016, AssistMed . . . sold substantially all of its assets to Nuance Communications, Inc." (Nuance), that "[i]mmediately after the sale to Nuance, AssistMed made an Assignment for the Benefit of Creditors to BOT," and that "business activities of AssistMed thereupon ceased." While the record regarding Grant's request for judicial notice is unclear,[1]

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[1] Appellant's Appendix in this matter contains a request for judicial notice and supporting declaration regarding the assignment with the October 2016 letter offered as support. That request bears a file-stamp suggesting it was filed in the trial court on March 24, 2017. However, it is not listed or described in the register of actions, and the trial court's November 28, 2017 minute order describes it as an "implied" request that was not separately set forth as required by the California Rules of Court. Based on this perceived procedural flaw, the trial court denied the request. At trial, AssistMed did not dispute that AssistMed made an assignment for the benefit of creditors to BOT, nor take issue with any aspect of the October letter or its contents, and the trial court's

AssistMed acknowledges, and we may thus treat as an admitted fact in the record, that AssistMed made an assignment for the benefit of creditors to BOT. (*Moore v. Powell* (1977) 70 Cal.App.3d 583, 586, fn. 2 ["A factual statement in a brief may be treated as an admission or stipulation when adverse to the party making it."].) Neither party provided any other documents related to the assignment.

C. *AssistMed's Request for Attorney Fees*

On July 25, 2017, AssistMed filed a motion for attorney fees incurred in defending against all three iterations of Grant's complaint.[2] AssistMed based its request for attorney fees on a provision in the employment agreement, which provides as follows:

"Attorneys' Fees. Should suit be brought to enforce or interpret any part of this Agreement, the prevailing party shall be entitled to recover, as an element of the costs of suit and not as damages, reasonable attorneys' fees to be fixed by the court (including without limitation, costs, expenses and fees on any

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ruling was couched in the context of the assignment having been made.

[2] AssistMed also included in the company's attorney fee motion a request to recover certain costs, and made a similar request via a memorandum of costs as well. The court granted Grant's motion to tax costs with respect to certain electronic discovery charges AssistMed sought associated with document collection, search, and retrieval. AssistMed did not appeal the court's ruling with respect to AssistMed's costs. Rather, AssistMed notes in its briefing that "if the [c]ourt has the authority to order the [t]rial [c]ourt to award [the costs denied] it would be appreciated." We decline to do so.

appeal). The prevailing party shall be entitled to recover its costs of suit, regardless of whether such suit proceeds to final judgment." (Underlining omitted.)

Grant opposed the motion, and the court heard argument on the issue. The court found unconvincing Grant's arguments regarding AssistMed's standing to seek attorney fees in the wake of the assignment to BOT, and noted also that Grant had waived such arguments by waiting several months after learning of the assignment to raise it with the court. The court also rejected Grant's arguments that AssistMed should not recover for fees incurred defending non-contract claims or fees incurred defending Berezovsky. The court ultimately awarded AssistMed $92,155 in attorney fees, which reflected a reasonableness reduction in AssistMed counsel's blended rate. David Grant timely appealed the trial court's order.

STANDARD OF REVIEW

In California, each party to a lawsuit must pay its own attorney fees unless a contract, statute, or other law authorizes a fee award. (Code Civ. Proc., §§ 1021, 1033.5, subd. (a)(10); *Musaelian v. Adams* (2009) 45 Cal.4th 512, 516.) Whether there exists such a legal basis for an award of attorney fees is generally a question of law we review de novo. (See *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 237; *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) We review all other aspects of an attorney fee award for abuse of discretion. (*Ibid.*)

DISCUSSION

A. *AssistMed's Standing to Seek and Receive Attorney Fees*

The employment agreement at the center of this litigation permits the "prevailing party" in any action "brought to enforce or interpret any part of [the] Agreement" to recover attorney fees. The Civil Code reinforces this right. (See Civ. Code, § 1717, subd. (a) ["the party prevailing on the contract . . . shall be entitled to reasonable attorney's fees" where a contract provides for an award of fees "incurred to enforce that contract"].) AssistMed is a prevailing party in this matter because it is "a defendant in whose favor a dismissal [was] entered." (Code Civ. Proc., § 1032 [defining "[p]revailing party"].) AssistMed thus had both a contractual and statutory basis for seeking attorney fees incurred while defending itself against Grant's claims.

Grant contends, however, that AssistMed lost standing to seek such fees when the company executed an assignment for the benefit of creditors to BOT. To support his argument, Grant offers not the assignment itself, but a letter stating that in October 2016 AssistMed transferred "substantially all of [AssistMed's] assets" to another company, Nuance, then executed an assignment for the benefit of creditors to BOT shortly thereafter.

Nothing in the record identifies which assets remained AssistMed's to assign after the initial sale to Nuance, and nothing in the record indicates which assets were included in AssistMed's assignment to BOT. Moreover, at the time of the assignment, AssistMed's right to collect attorney fees in this matter was highly uncertain, dependent on the outcome of the trial and other risks related to judicial proceedings. The insufficiency of the record to

establish that the assignment included this contingent right is fatal to Grant's standing argument.

Grant's arguments to the contrary assume what the record is insufficient to prove, and are thus unpersuasive. For example, Grant cites Code of Civil Procedure section 1801, which lists the property an individual assignor may choose to exempt from an assignment for the benefit of creditors, and section 703.140, which enumerates the rights an assignor may retain in the context of federal bankruptcy proceedings. Grant suggests we infer from these code sections that all assets *not* listed are automatically included in an assignment for the benefit of creditors and cannot be excluded. But even if these provisions apply to AssistMed's assignment—an assignment of a company, not an individual, outside the bankruptcy context—they shed no light on what AssistMed had left to assign to BOT after selling "substantially all" of its assets to Nuance, and thus whether a contingent future interest in attorney fees could be included in that assignment.

Moreover, Grant's arguments that an assignee for the benefit of creditors is the real party in interest in any litigation involving the assignor—and thus has standing to exercise all rights associated with such litigation—likewise assumes a particular scope for the assignment to BOT that the record does not support. An assignee has standing to insert itself into litigation and defend claims brought against the assignor as a "trustee for all the creditors . . . *charged with the duty to defend the property in its hands*." (See *Credit Managers Assn. v. National Independent Business Alliance* (1984) 162 Cal.App.3d 1166, 1172, italics added; *Sherwood Partners, Inc. v. EOP-Marina Business Center, L.L.C.* (2007) 153 Cal.App.4th 977, 983 ["[A]n assignee for the benefit of creditors . . . ha[s] a duty to marshal and protect the assets of

[the assignor], which may include filing and defending lawsuits."].) But we have no way of knowing which assets BOT was assigned.[3] The trial court did not err is concluding AssistMed had standing to collect an attorney fee award in this matter.

Finally, to the extent Grant is concerned about being required to pay attorney fees twice—first to AssistMed and then to BOT or an AssistMed creditor that might subsequently seek to collect fees—Grant had tools to prevent this and chose not to employ them. Specifically, after learning of the assignment, Grant made no effort to bring BOT (or Nuance) into the case below.

B. *Apportionment of Attorney Fees*

Where, as here, "a cause of action based on [a] contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees . . . only as they relate to the contract action." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129 (*Reynolds*).) This serves to prevent parties from creatively pleading to expand the scope of the attorney fees they may seek. (See *ibid.*) As a result of this rule, a court may need to allocate or "apportion" fees as between contract and noncontract causes of action. (See *ibid.*) At the same time, however, a plaintiff's decision to join causes of action "should not dilute [the plaintiff's] right to attorney's fees." (*Ibid.*) Thus, "[a]ttorney[] fees need not be apportioned between distinct causes

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[3] The case law Grant cites regarding a bankruptcy trustee's ownership of a debtor's affirmative causes of action is inapposite and does not suggest a different conclusion. Grant cites no authority explaining why we should treat a defendant's contingent future interest in an attorney fee award in the same manner we treat an affirmative right to sue in this context.

of action where plaintiff's various claims involve a common core of facts or are based on related legal theories." (*Drouin v. Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, 492–493 (*Drouin*); *Reynolds*, *supra*, 25 Cal.3d at pp. 129–130 ["[a]ttorney fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed"].) When claims are "factually intertwined" in this way (*Drouin, supra*, 163 Cal.App.3d at p. 493), "liability issues are so interrelated that it would [be] impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not" and "allocation is not required." (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1133.) By the same logic, where claims against multiple defendants represented by joint counsel are factually intertwined, a court need not apportion a fee award based on that counsel's efforts as between the two clients. (See *Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1277 (*Cruz*).)

1. *Apportionment as between various causes of action*

Over the course of the litigation, Grant alleged eight different causes of action. All derived from the same core allegations regarding AssistMed's failure to provide a loan and certain compensation Grant interpreted the employment agreement as guaranteeing.

Specifically, in his contract-based causes of action, Grant alleged that the company's withholding this loan and other compensation breached the written employment agreement between the parties, as well as a covenant of good faith and fair dealing implied in that agreement.

One of the contractual benefits Grant sought with his breach of contract claim—a severance payment—would only be triggered if he were discharged. Grant had resigned, but alleged he was nevertheless entitled to the severance benefit, because he had been constructively discharged. Grant alleged a separate cause of action for constructive discharge on this basis as well. The breach of contract and constructive discharge claims are further intertwined in that Grant alleged the unfair treatment he characterized as constructive discharge began when Grant requested the same loan he sought to recover with his contract-based causes of action.

Grant's fraud, negligent misrepresentation, and fraud in the inducement causes of action are based on representations Grant alleges were "memorialized in the [employment agreement]," that induced him to sign that agreement, and/or that involved some of the benefits and compensation he sought through his breach of contract and constructive discharge causes of action.

Finally, Grant's Labor Code cause of action for wages owed was based on AssistMed allegedly refusing to pay Grant his final paycheck, which Grant also alleged to be a breach of contract in support of his contract-based causes of action.

Thus, all causes of action Grant alleged share a "primary economic focus" on seeking certain benefits Grant interpreted the employment contract as guaranteeing him, and the company's response when Grant tried to secure those benefits. (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 688 (*Bell*).) No cause of action strayed from this common factual core, thus the litigation did not involve "separate and distinct claims, one entitled to statutory fees and the other not." (*Ibid.*) Indeed, in some instances, one cause of action "substantively beget[s]" another. (*Id.* at pp. 688–689.)

Grant stresses that certain of AssistMed's demurrer arguments were directed exclusively at noncontract causes of action, and that the fees associated with these efforts are therefore not recoverable. This argument misunderstands the applicable law. That AssistMed demurred to specific causes of action speaks to the legal sufficiency of those claims as pled, not to whether they rely on a "common core" of facts. (*Drouin, supra,* 163 Cal.App.3d at p. 493) The trial court did not abuse its discretion in determining that Grant's claims were factually intertwined due to such a shared factual basis, and correctly declined to apportion fees associated with them.[4]

2. *Apportionment as between AssistMed and Berezovsky*

Grant's arguments that the court should have apportioned the fees attributable to defending Berezovsky, as opposed to AssistMed, likewise fail.

A court need not apportion fees awarded to counsel representing multiple parties when the claims at issue are " 'so factually interrelated that it would have been impossible to separate the activities . . . into compensable and noncompensable time units.' " (*Cruz, supra,* 155 Cal.App.4th at p. 1277.) This

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[4] Because the trial court did not err in concluding apportionment was not required, Grant's arguments regarding "block billing" are also beside the point. The authority Grant cites to support this argument stands for the proposition that, where the court has determined apportionment is required, if the party seeking attorney fees cannot provide a basis for that apportionment, the court may decline to award any fees. (*Bell, supra*, 82 Cal.App.4th at p. 689.)

occurs where the two jointly represented parties assert all the same claims or defenses, and "[t]he[ir] attorneys . . . had to do the same legal research and analysis" for each. (*Id.* at p. 1278.)

Such is the case here. All causes of action alleged in all iterations of Grant's complaint were against both Berezovsky and AssistMed, with the exception of the Labor Code cause of action alleged in the first amended complaint.[5] Obviously, this means the same set of alleged facts underlies the claims asserted jointly against both defendants. Defense counsel filed all demurrers to those complaints on behalf of both defendants, asserting the same arguments on both their behalves. Thus, "their counsel would have been required to do the same legal research and analysis in preparing those [demurrers] regardless of whether they applied to both defendants or to [AssistMed] only. '[T]he fact [that Berezovsky] incidentally benefited from the legal work performed on behalf of [AssistMed] does not diminish [AssistMed's] contractual right to recover attorney fees litigating issues common to' both defendants." (*Hill v. Affirmed Housing Group* (2014) 226 Cal.App.4th 1192, 1197–1198; see *Cruz, supra*, 155 Cal.App.4th at p. 1277 [declining to apportion fees between multiple clients because claims were " ' " 'inextricably intertwined' " [citation], making it "impracticable, if not impossible, to separate the multitude of conjoined activities" ' "].)

Grant's argument that a non-prevailing party is not entitled to recover attorney fees ignores the issue actually before the court. Berezovsky was not awarded anything; rather, AssistMed recovered

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[5] The Labor Code cause of action was directed at AssistMed alone, and thus would not provide a basis for reducing AssistMed's fee award in any event.

fees to which the company was contractually and statutorily entitled. The trial court did not abuse its discretion in declining to apportion those fees as between Berezovsky and AssistMed when the legal work paid for could not realistically be attributed to either defendant individually.

DISPOSITION

The trial court's order awarding AssistMed's attorney fees is affirmed. AssistMed shall recover its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.